IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1117

**HEATHER McFADYEN-SNIDER,**
*Petitioner,*

VS.

**UNITED STATES OF AMERICA,**
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming denial of petitioner's motion to dismiss which was based on double jeopardy grounds.

## OPINIONS BELOW

The opinion of the Court of Appeals reversing petitioner's conviction, its order sustaining the trial court's denial of her motion to dismiss on double jeopardy grounds, and its order denying her motion for rehearing have not

yet been reported. The opinion reversing petitioner's conviction and remanding for a new trial is printed as Appendix A hereto, *infra,* p. 1a. The order sustaining her motion to dismiss on double jeopardy grounds is printed as Appendix B hereto, *infra,* p. 14a, and its order overruling her motion for rehearing is printed as Appendix C hereto, *infra,* p. 17a.

## JURISDICTION

The opinion of the Court of Appeals reversing conviction and remanding for a new trial, (Appendix A, *infra,* p. 1a) was decided and filed April 15, 1977. The order of the Court of Appeals sustaining the action of the trial court in denying petitioner's motion to dismiss on double jeopardy grounds, (Appendix B, *infra,* p. 14a) was entered on December 9, 1977. The order denying petition for rehearing, (Appendix C, *infra,* p. 17a) was entered on January 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254.

## QUESTION PRESENTED

This case presents one question:

Was the prosecutorial and/or judicial misconduct in this case of sufficient proportion to bar reprosecution under the standards enunciated by this Court in *United States* v. *Jorn, United States* v. *Dinitz* and *Lee* v. *United States* and, if so, is this petitioner precluded from relying upon the Double Jeopardy Clause to bar such reprosecution, where her previous conviction was reversed on appeal, rather than terminated by the trial court on a defense motion for a mistrial?



## CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V. — CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT

On April 12, 1976, petitioner was indicted in five counts in the Middle District of Tennessee, charging a scheme to defraud the Hamilton Bank of Nashville by means of mail and wire fraud and by making false statements in violation of 18 U.S.C., §§ 1014, 1341 and 1343.

After a jury trial, petitioner was convicted on four counts of the indictment, but the jury failed to agree on count 2, which was later dismissed on motion of the government.[1]

[1] The indictment charges, in count one, a scheme to defraud; in count two, making false statements to influence the action of a bank; in count three, fraud by wire; in count four, mail fraud; and in count five, making false statements and furnishing a false financial statement to influence the action of a bank.

On appeal, the United States Court of Appeals for the Sixth Circuit, on April 15, 1977, reversed the conviction because of prosecutorial misconduct and remanded the case for a new trial. (Appendix A, *infra*, p. 1a).

Upon remand, the case was set for trial in the district court. Petitioner then moved the court to dismiss on double jeopardy grounds. This motion was denied.

Appeal was taken and on the 9th day of December, 1977, a decision was rendered affirming the district court. (Appendix B, *infra*, p. 14a). A petition to rehear was filed, but on the 13th day of January, 1978, was denied. (Appendix C, *infra*, p. 17a).

The relevant evidence may be summarized as follows:

In the early part of 1974, petitioner approached officials of the Hamilton Bank of Nashville, in Nashville, Tennessee, and a subsidiary bank in Chattanooga, Tennessee, relating to her need for financing the purchase and sale of railroad cross ties and two million metric tons of rice.

In May, 1974, petitioner opened three bank accounts in the Hamilton Bank and provided the bank with a financial statement.

On May 7, 1974, the bank sent John Andreson, one of its officials, with petitioner on a trip to England for the purpose of investigating her buyers of commodities for which the bank would issue letters of credit. While in England checks, which petitioner had deposited to open her accounts at the bank, were returned for insufficient funds. Thereafter, the bank agreed to extend credit to petitioner in the sum of $25,000.00, part of which was used to cover an overdraft written to pay for the air fare to



England for petitioner, her assistant, and Andreson. Petitioner received about $20,000.00 of the authorized credit.

Upon her return from England, petitioner again visited the bank, in July, 1974, and attempted to obtain further credit. The bank declined and further business dealings were terminated.

Petitioner later paid $6,300.00 on the note executed to secure her indebtedness to the bank. Because she did not repay the balance, she was charged with fraud.

At her trial, petitioner testified in her own defense and admitted her dealings with the bank, but denied any intent to defraud. During cross-examination of petitioner, the Assistant United States Attorney advised the court, out of hearing of the jury, that he wished to prove that petitioner had been a prostitute. The trial court pointed out that petitioner had not introduced evidence of her good character and warned the prosecutor against "overkill".

Ignoring the trial court's advice, the prosecutor, on rebuttal,[2] called two witnesses who testified that petitioner had told them that she had been kept by several men and had sold herself to prominent, wealthy men.

The Court of Appeals found that this evidence was incompetent and rebutted nothing. Furthermore, it found this evidence was unrelated to the charges against petitioner, added nothing to the prosecutor's case, catered only to the passions of the jury and prejudiced her chance for a fair trial. (Appendix A, *infra*, p. 9a).

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[2] This was done in the presence of the jury.

The prosecutor also offered proof of issuance of bad checks which the Court of Appeals found was unrelated to the charges. It held that this testimony was offered solely for the purpose of prejudicing petitioner and depriving her of a fair trial. (Appendix A, *infra*, p. 11a).

The trial judge repeatedly interrupted the proceedings to examine and cross-examine witnesses and to inject personal prejudice. Among other things, the Court utilized these interruptions to ridicule the petitioner (Tr. 140; 161-163), to argue with petitioner over her choice of words (Tr. 307), to cross-examine petitioner (Tr. 317-20; 344; 348-349; 393-394; 396-403; 424-425; 433-435; 453-454; 461-463; 483; 490-491), to comment about the absence of documents (Tr. 393; 399-402; 399; 402), and about her marriages and relationships with men, all of which was done in a sarcastic and disparaging manner (Tr. 424-425; 441-443; 498-501; 508-509; 511; 516; 530-31; 540; 541),[3] and to state, out of the presence of the jury, the defendant "doesn't have any credibility" (Tr. 532).

On appeal, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case for a new trial because of misconduct of the prosecutor (Appendix A, *infra*, p. 2a) but did not reach the issue of judicial misconduct. (Appendix A, *infra*, p. 13a). Instead it indicated that it was unlikely that the same judge would want to try the case again. (Appendix A, *infra*, p. 13a).

In May, 1977, the United States Attorney indicated that he would seek to retry petitioner on the same charges and the case was set for trial before a different judge. On June 10, 1977, petitioner filed a motion to dismiss the

[3] All in a manner to prejudice petitioner in the eyes of the jury and to show the Court's confidence in the government's case and his disdain for the petitioner's case.



indictment and bar further prosecution on the grounds of double jeopardy. The trial court denied this motion on June 24, 1977.

On the authority of *Abney* v. *United States,* 431 U.S. 651 (1977), petitioner appealed the district court's ruling to the United States Court of Appeals for the Sixth Circuit. On December 9, 1977, the Court of Appeals rendered its order, affirming the district court. (Appendix B, *infra,* p. 14a).

On December 19, 1977, petitioner filed her petition for rehearing, which was denied by order dated January 13, 1978. (Appendix C, *infra*, p. 17a).

## REASONS FOR GRANTING THE WRIT

The question presented in this case has never been decided by this Court. It is significant in the administration of criminal law. The question relates to the right of a defendant to rely on the Double Jeopardy Clause after his conviction has been reversed on appeal because of prosecutorial misconduct and/or judicial overreaching or gross negligence, even though he made no motion for mistrial on these grounds. This Court, the United States Courts of Appeals for the Fifth and Eighth Circuits, and the Supreme Court of Pennsylvania, have held that reprosecution is barred, for these reasons, by the Double Jeopardy Clause, where mistrials have been granted in the trial court, either on motion by defendant or by prosecutor or *sua sponte*. We have found no case where the trial judge granted a mistrial because of his own misconduct although this Court has held retrial is barred by the Double Jeopardy Clause in such a case. See *United States* v. *Jorn,* 400 U.S. 470 (1971).

## ARGUMENT

### I.

### THE MISCONDUCT OF THE PROSECUTOR WAS OF SUCH PROPORTION AS TO FALL WITHIN THE PURVIEW OF THAT CONDEMNED IN JORN, DINITZ AND LEE.

In its opinion dated April 15, 1977, the Court of Appeals held:

> "We reverse defendant's conviction because of misconduct of the prosecutor." (Appendix A, *infra,* p. 2a).

In support of this holding, the court clearly and precisely found, with respect to testimony regarding prostitution:

> "Despite the warning given by the district judge to the prosecutor at the bench hearing, the prosecutor persisted in ignoring these warnings and deliberately offered the incompetent evidence in rebuttal. This evidence rebutted nothing; plaintiff (sic) did not testify that she had been a good moral person." (Appendix A, *infra,* p. 8a).

After finding that the trial court abused its discretion in permitting rebuttal testimony on prostitution, (Appendix A, *infra,* p. 9a) the court further found that allowing testimony of petitioner's [prostitution]:

> ". . . not only resulted in prosecutorial overkill, but also permitted the jury to consider evidence of Heather's background which was wholly unrelated to the charges against her of wire and mail fraud and false statements. This evidence added nothing to the prosecutor's case and served only to cater to the passions of the jury. It tended to put her on trial for conduct not in the indictment and prejudiced her chance for a fair trial." (Appendix A, *infra,* p. 9a).



And with respect to evidence of bad checks, the court found:

> "*The real reason* the prosecutor offered the testimony was to get before the jury incompetent and inadmissible evidence which was highly prejudicial and which deprived the defendant of a fair trial." (Appendix A, *infra,* p. 11a). [emphasis supplied]

The Court of Appeals, however, did not reach the question of judicial misconduct, significantly stating that it was unlikely that the district judge would want to try the case again. (Appendix A, *infra,* p. 13a).

The only authorities cited by the Court of Appeals to support its conclusion that double jeopardy does not apply are those cited in its order denying the petition for rehearing, *Ball* v. *United States,* 163 U.S. 662 (1896), and *Green* v. *United States,* 355 U.S. 184 (1957).

These cases, in effect, hold that reprosecution is not barred on double jeopardy grounds where a conviction has been set aside on appeal. See, 355 U.S. at p. 189. We do not quarrel with this general principle, but we assert that a different rule applies where there has been ". . . any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused . . .". *United States* v. *Tateo,* 377 U.S. 463, 468 (1964).

Although this Court has declined to formulate rules which categorize circumstances which permit or preclude retrial, in *United States* v. *Jorn,* 400 U.S. 470, 480 (1971), it has held that misconduct of the trial judge in abruptly discharging the jury of its own motion, operates to prevent retrial on double jeopardy grounds, because the trial court had abused its discretion. *United States* v. *Jorn,* 400 U.S. at 487.

The Court, in *Jorn,* while reaffirming the principles set forth in *Ball* and *Green,* nevertheless noted that there is an essential difference where there has been prosecutorial or judicial overreaching, in which case the double jeopardy clause prevents reprosecution. 400 U.S. at 484-485.

Later, this Court reaffirmed this principle in *United States* v. *Dinitz,* 424 U.S. 600 (1976). Although the Court there held that where a mistrial is granted at defendant's request because of the conduct of the trial judge, where that conduct was not motivated by bad faith or to harass or prejudice the defendant, reprosecution was not barred. However, this Court held:

> "The double jeopardy clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad faith conduct by judge or prosecutor' *United States* v. *Jorn, supra,* at p. 485, threatens the '[H]arrassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. *Downum* v. *United States,* 372 U.S. at 736. See, *Gori* v. *United States,* 367 U.S. 369; *United States* v. *Jorn, supra,* at 489 (Stewart, Jr. dissenting); cf. *Wade* v. *Hunter,* 336 U.S. 692." *United States* v. *Dinitz,* 424 U.S. 611.

This Court, in *Dinitz,* excused the conduct of the trial judge because it was not done in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his rights. 424 U.S. at 611.

More recently this court has reaffirmed *Jorn* and *Dinitz.* In *Lee* v. *United States,* ..... U.S. ..... (1977); 53 L.Ed.2d 80 (Adv. Sheet, July 25, 1977), the court held to the view



that if the underlying error was intended to provoke the motion for mistrial, motivated by bad faith or undertaken to harass or prejudice, a retrial would be barred. 53 L. Ed.2d at p. 89.

The thing that seems to emerge from these four Supreme Court cases, *Tateo, Jorn, Dinitz,* and *Lee,* is that the crucial difference that bars reprosecution on double jeopardy grounds is where mistrial was declared because of prosecutorial or judicial overreaching, coupled with a design to provoke a mistrial in order to strengthen the government's position at a later trial. Evidence of such a design is provided where the prosecutorial overreaching was due to gross negligence or intentional misconduct. *United States* v. *Kessler,* 530 F.2d 1246, 1256 (5th Cir. 1976).

Analogizing *Jorn, Dinitz* and other cases, *Id,* p. 1256, the Court of Appeals for the Fifth Circuit concluded:

> "Thus, a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial, to determine if there was 'prosecutorial overreaching' is our inquiry. If 'prosecutorial overreaching' is found, a second trial is barred by the Double Jeopardy Clause notwithstanding the fact that the defendants requested the mistrial.
>
> To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction'." 530 F.2d 1256.

In a case like petitioner's, the Eighth Circuit reversed a conviction on Double Jeopardy grounds because of misconduct of the prosecutor. *U.S.* v. *Martin,* 561 F.2d 135

(8th Cir. 1977). Even though the prosecutor was not alleged to have provoked a mistrial, the court held it was enough that his actions went beyond mere negligence. The court characterized his conduct as improper and prejudicial and charged him with gross negligence.

The court relied upon *Jorn, Dinitz* and *Kessler* in reaching its conclusion. The court held:

> "* * * Although mere negligence by the prosecutor is not the type of overreaching contemplated by *Dinitz,* if the prosecutorial error is motivated by bad faith or undertaken to harass or prejudice the defendant, then prosecutorial overreaching will be found * * *." 561 F.2d at p. 139.

The only difference between *Martin's* case and that of petitioner is that *Martin's* counsel moved for a mistrial which was denied. In the final analysis, however, there was appellate reversal which is the question presented here.

The Supreme Court of Pennsylvania has also addressed the question. In *Commonwealth* v. *Bolden,* 373 A.2d 90 (Pa. 1977) that court held that if a mistrial is ordered on defendant's motion alleging intentional or grossly negligent misconduct of judge or prosecutor, the Double Jeopardy Clause precludes retrial. The court specifically adopted the reasoning of *Kessler.* 373 A.2d at p. 108.

In reversing this petitioner's conviction below, the Court of Appeals observed:

> "The facts in this case reveal an incredible lack of ordinary care, diligence and prudence on the part of the bank officials of the Hamilton Bank of Nashville, together with their cupidity, all of which contributed in large measure to whatever loss it sustained." (Appendix A, *infra,* pp. 2a-3a).



The court then discussed the circumstances involving petitioner's relationship with the bank, (Appendix A, *infra,* pp. 3a-5a) and concluded ". . . There was no proof that the bank ever advanced one cent to the defendant on any of these transactions, or that defendant made any sales whereby the bank would be entitled to a commission." (Appendix A, *infra,* p. 5a).

It seems to us that the character of the proof adduced, coupled with the findings of the Court of Appeals with regard to misconduct of the prosecutor, compels the conclusion that the prosecutor's intent was indeed to provoke a mistrial, especially in light of the warning by the district judge that to offer the tainted evidence would be "overkill". (Appendix A, *infra,* pp. 7a, 8a).

Unfortunately, however, such a motion was not made.[4] Nevertheless, we feel that this failure is not fatal and brings us to the issue we raise here. If the motion had been made in the trial court and granted, but with an order to reprosecute, it would seem that that decision could have been reversed on appeal if the above criteria were found to exist.

We fail to see any material difference. The fact that defense counsel in the trial court failed to move for a mistrial should not prejudice defendant's rights upon reversal where the issue is squarely presented and based on precisely the identical circumstances. It seems to us that, at the very least, the prosecutor was guilty of gross negligence or intentional misconduct.

While we have found no case directly in point on the issue raised here, we call the Court's attention to a let-

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[4] Present counsel did not try the case in the district court.

ter from an Assistant Attorney General of the Criminal Division of the Department of Justice which was considered and quoted in the *Kessler* opinion:

> "The rule which we glean from the (Supreme) Court's decisions involving the right of retrial is that retrial of a defendant is not constitutionally prohibited following the termination by mistrial or *appellate reversal* of a criminal conviction, as long as the ruling which resulted in the mistrial or *reversal* was not an acquittal, was for defendant's benefit (see *Gori, supra*), and *was not necessitated by prosecutive misconduct.* Compare *Downum* v. *United States,* 372 U.S. 734 [83 S.Ct. 1033, 10 L.Ed.2d 100]. *It is irrelevant whether or not the defendant made any motion for mistrial* or consented to the district court's action. [emphasis supplied]
>
> Letter from Honorable Will Wilson to Honorable John L. McClellan, May 13, 1970, *Senate Committee on Judiciary, Amendments to the Criminal Appeals Act,* S.Rep. No. 91-1296, 91st Cong., 2d Sess. 10 (1970)." 530 F.2d at pp. 1255-1256.

This quotation forms an integral part of the Court's rationale in *Kessler*. We suggest it cannot be ignored.

Of course, petitioner was never acquitted, although the decision on appeal was in her favor. There was prosecutorial, not to mention judicial, misconduct. Our argument that these principles apply to appellate reversal is, on the analysis of the Attorney General contained in the above letter, buttressed by the fact that the absence of a motion for mistrial is said to be irrelevant.

We wish to emphasize that the Court of Appeals in reversing petitioner's conviction adjudicated the misconduct of the prosecutor in almost the exact language which *Dinitz* and *Kessler* held to be "intentional" and "seriously prejudicial" to the defendant. See, 530 F.2d at p. 1256. We are repeatedly drawn to the adjudication of the Court of Appeals in finding that the real reason that the testimony was offered was to inject incompetent and inadmissible evidence which was prejudicial and deprived defendant of a fair trial. (Appendix A, *infra,* pp. 8a, 9a).



## II.

## THE MISCONDUCT OF THE TRIAL JUDGE WAS OF SUCH PROPORTION AS TO FALL WITHIN THE PURVIEW OF THAT CONDEMNED IN JORN, DINITZ AND LEE.

Petitioner also submits that the Double Jeopardy Clause prohibits her reprosecution because of the misconduct of the trial judge. The Court of Appeals did not reach this question because its determination of prosecutorial misconduct was deemed adequate to support its decision, however, the court significantly commented in its opinion "* * * It is unlikely that the district judge would want to try this case again". (Appendix A, *infra,* p. 13a).

This Court has recognized that ". . . The influence of the trial judge on the jury is necessarily and properly of great weight, and his slightest word or intimation is received with deference and may prove controlling". *Starr* v. *United States,* 153 U.S. 616, 626 (1894). See also, *Querica* v. *United States,* 289 U.S. 466 (1933). Although the trial court is not a mere moderator and may ask questions for clarification of issues, it has been held that it is not a desirable practice for him to interrupt the proceedings by questioning the witness and interrogating the witnesses in the presence of the jury in such a way as to place him in the role of an advocate. *United States* v. *Ball,* 428 F.2d 26, 30 (6th Cir. 1969).

We have counted approximately one hundred thirty-five occasions, in the record, upon which the trial judge violated this principle.

The trial judge abandoned his impartiality and gave the jury the impression that he did not believe petitioner, (see, *United States* v. *Wyatt,* 442 F.2d 858 (D.C. Cir. 1968); *United States* v. *Grunberger,* 431 F.2d 1062 (2d Cir. 1970); *United States* v. *Tobin,* 426 F.2d 1279 (7th Cir. 1970); *United States* v. *DiSisto,* 289 F.2d 833 (2nd Cir. 1961)), and he conveyed to the jury an impression of his belief in the probable guilt of the defendant which was too forceful to permit the jury freely to perform its function of independently determining the facts. *United States* v. *DiSisto,* 289 F.2d 833, 835.

The trial court began by disparaging the defense evidence of a contract signed by petitioner and a prospective wheat buyer in London. Since one of the government's contentions was that petitioner had no commodities for sale, it was important for the defense to show that she did in fact enter into contracts for the sale of commodities, which was of course the purpose of the trip to London. During defense counsel's cross-examination of John Andresen, a representative of the bank, the witness identified an exhibit as a contract and testified that he witnessed it. (Tr. 137-8) The court then took over and asked several questions (Tr. 138-40), finally leading the witness: "*In other words, it was a piece of paper, no wheat and no money,* right?" (Tr. 140) The obvious thrust of the court's question was to ridicule the defense effort to establish that petitioner had entered into a contract.

Later, during the testimony of the same witness, the court resumed its comments on the contract:



"The Court: Let me see if I understand correctly. There has been an exhibit introduced here, Exhibit No. 11, that has been referred to as a contract between McFayden Enterprises, Limited and a bank, no name for buyer. The only thing indicating a buyer is the last line under buyer it says by and then a signature. Is that what you called a contract?

"The Witness: This is what they were signing as a contract.

"The Court: Is that what you called a contract and told the people in Nashville on that long distance line that the contract was signed and everything was okay?

This is what you called a contract?

"The Witness: This is what I would have called it at that time.

"The Court: Go ahead.

"Mr. Windsor: I don't have any more questions.

"The Court: Call another witness then.

"Mr. Windsor: Mr. DeSantolo.

"The Court: Ladies and gentlemen of the jury, I will tell you that this piece of paper or this document doesn't have in it anywhere the name of the buyer. That is just left blank. It has other blank spots in it that were purportedly going to be filled in sometime but were not filled in before the document was signed, if these are the signatures and the signature of Mrs. Snider or McFayden-Snider purportedly witnessed by John Andresen and somebody by the name of Jones and the signature of another man who appears as the buyer but not listed as said buyer, as representing somebody else, witnessed by same, John Andresen and another witness by the name of Jones.

It is an addendum in somebody's writing purportedly noted by the signature of Heather McFayden-Snider and R. Siheeb it has been called.

That is what has been called a contract. Okay. They can see it later. Go ahead. Call your next witness.

Is that the only contract, Mr. Windson, we have got?

"Mr. Windsor: That is the only one that has been identified. That is the only one I know of.

"The Court: Go ahead." (Tr. 161-63)

The trial court's comments on the contract, repeatedly referring to it as "What you have called a contract" and pointing out to the jury that the name of the buyer had not been filled in on the first page, more resembled the closing argument of a prosecutor. The court's remarks obviously "had the effect of disparaging the defense" in the eyes of the jury. (*United States* v. *Grunberger*, 431 F.2d 1062, 1067).

But the court's most prejudicial comments came during the testimony of petitioner herself. Early in her direct examination he interrupted her testimony to argue with her choice of words:

"The Witness: Well, with the Union Pacific contract because I was going to be dealing with a gentleman in Tennessee and between all of us we didn't have adequate cash flow in our bank accounts to cover—

"The Court: You mean you didn't have enough money at the bank? Is that what you are saying?

"The Witness: Yes, sir.

"The Court: Money in the bank sounds a whole lot better to me than cash flow because I know what money in the bank is." (Tr. 307)

There were numerous other interruptions during direct examination which are too lengthy to quote here. The court's questions were in the main in the nature of cross-examination, an attempt to bring out and emphasize to the jury alleged inconsistencies—followed frequently by comments about the absence of documentary evidence to back up the witness' testimony. (Tr. 317-20; 344; 348-49; 393-94; 396-403; 424-25; 433-35; 453-54; 461-63; 483; 490-91.)



All of the foregoing interruptions by the court occurred during direct examination.

Sometimes the court interrupted the order of direct examination to ask for answers to questions which the court wanted answered. (Tr. 358). The Court also asked questions beginning "I thought you said * * *" and the like. (Tr. 351; 353). The court also frequently commented on the witness' unresponsive answer in the presence of the jury (Tr. 348) and charged counsel with the responsibility for seeing that petitioner answered the questions. (Tr. 352)

The following is typical, again, on direct examination:

"By The Court: You never sold them anything, as I understand? You never delivered anything, right?

"The Witness: Your Honor, the reason—

"The Court: Just answer the question. Did you ever deliver anything to them?

"The Witness: No, sir, because—

"The Court: Okay. I know you said because you found out they were a fraud, is that right?

"The Witness: Yes. I would like to explain why we took this $50,000. We took this $50,000 in good faith.

"The Court: You didn't take the $50,000. You saw a check written. You never got it?

"The Witness: No. They put up the $50,000 as escrow funds to guarantee they were going to perform their part by submitting their letter of credit to the Hamilton National Bank, which never arrived.

"The Court: Was the check part of an agreement?

"The Witness: It was a contract.

"The Court: Was it part of a contract that provided for this check to be issued and be held in escrow?

"The Witness: Yes, sir, Your Honor.

"The Court: Do we have that contract here?

"The Witness: No, I don't have it with me.

"The Court: All right. Go ahead." (Tr. 368-69)

Again, we direct attention to the court's comment as to the absence of documents. And, again, a short time later, the court asked: "Do you have anywhere in the world any receipt, contract?" (Tr. 393). A few pages later the court again interrupted the witness to ask where certain contracts were, (Tr. 399-402) asking: "You don't have any down here today?" (Tr. 399), and "You don't have any in Nashville for this trial?" (Tr. 402) The trial Court's persistent and repeated comments on the absence of documentary evidence surely by now have taken on the character of a prosecutor's remarks during closing argument. Similarly the court later commented on the absence of a witness, indicating there was nothing to corroborate defendant's testimony:

> "The Court: Does he still have it, or do you have it, or what?
>
> "The Witness: No, Mr. Kurth would have it, Your Honor.
>
> "The Court: He has these things to show that you—
>
> "The Witness: We had a backup buyer.
>
> "The Court: You had somebody buy them. You don't have them and he is not here?" (Tr. 483)

The court's comments on defendant's marriages and relationships with men were also sarcastic and disparaging. (Tr. 424-25; 441-43)

On cross-examination the court continued to interrupt and engage in argumentative and sarcastic exchanges with petitioner. (Tr. 498-501; 504-506; 508-509; 511; 516; 530-31; 540-41)

The court's comments continued after petitioner testified that Delta Airlines was a creditor:

> "The Court: Did you have an account with them or give them a check for a ticket? Did you give them a check for a ticket and the check bounced?



> "The Witness: I did, sir.
>
> "The Court: That is why they became a creditor? They didn't open an account with you. You gave them a check for a cash transaction and the check bounced?
>
> "The Witness: Yes. I had to declare—Delta is listed." (Tr. 516)

The repeated interruptions by the trial judge ridiculing her, arguing with her over her choice of words, cross-examining her, commenting about the absence of documents and about her marriages and relationships with other men in a sarcastic and disparaging manner, once stating, although out of the presence of the jury, that she did not have any credibility, should give this Court some indication of the massive, if not overwhelming, prejudice and atmosphere of guilt created by this judicial misconduct, especially when further aggravated and compounded by the attendant misconduct of the prosecutor.

We submit that it is no answer that the court instructed the jury that credibility was to be determined by the jury, and it should not construe anything the judge said as indicating that he had an opinion in the matter (Tr. 651). Here, as in *United States* v. *DiSisto*, 289 F.2d 833, it was not possible to remove the prejudicial impression merely by the instructions given in the charge. To the same effect, see *United States* v. *Grunberger*, 431 F.2d 1062, 1068.

While this is not the sort of judicial misconduct to be found in *Jorn* and *Dinitz*, we think it is far worse. In those two cases, the focal point was abuse of discretion. Here, the court took over the trial of the case.

If the testimony of petitioner was so incredible, it would seem unnecessary to resort to such tactics. The only conclusions we can draw is that this combined conduct of court and prosecutor was designed to provoke a motion

for mistrial in order to strengthen the government's position at a later trial, or to assure the government a conviction.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX



## APPENDIX A

### OPINION BELOW REVERSING CONVICTION

No. 76-2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

HEATHER MCFAYDEN-SNIDER,
*Defendant-Appellant.*

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed April 15, 1977.

Before: WEICK and LIVELY, *Circuit Judges,* and TAYLOR*, *District Judge.*

WEICK, *Circuit Judge.* Appellant, Heather McFayden-Snider (hereinafter referred to as Heather), appeals from a judgment of conviction entered upon a guilty verdict by a jury on two counts of an indictment charging her with the marking of interstate telephone calls for the purpose of carrying out a scheme to defraud the Hamilton Bank of Nashville, in violation of 18 U.S.C. § 1343; on one count

* The Honorable Robert L. Taylor, Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

charging mail fraud in violation of 18 U.S.C. § 1341; and on one count charging the making of a false financial statement to the Hamilton Bank of Nashville for the purpose of influencing said bank in extending credit, in violation of 18 U.S.C. § 1014. The jury was unable to agree upon a verdict as to a false verbal statement count and the Government dismissed the charge, namely, on Count 2. She received three five-year concurrent sentences on the wire and mail fraud counts, and a suspended sentence with three years' probation on the false financial statement, Count 5.

Heather's main contentions on appeal are that prejudicial error was committed and she was denied a fair trial by the erroneous admission of evidence to the effect that she had been a prostitute; that such evidence was not relevant in any respect to the mail fraud charges for which she had been indicted, and such evidence was introduced by the prosecutor for the sole purpose of creating prejudice against her; that evidence concerning her writing bad checks was unrelated to the offenses charged in the indictment; and that the trial judge assumed the role of the prosecutor in extensively cross-examining witnesses and commenting on the credibility of the defendant.

We reverse defendant's conviction because of misconduct of the prosecutor, and remand the case for a new trial.

I

The facts in this case reveal an incredible lack of ordinary care, diligence, and prudence on the part of the bank officials of the Hamilton Bank of Nashville, together with



their cupidity, all of which contributed in a large measure to whatever loss it sustained.

In March, 1974 Heather called by telephone from Miami, Florida, a bank in McMinnville, Tennessee, to seek financing for the purchase of railroad crossties for the Union Pacific Railroad. That bank referred her to the Hamilton Bank of Nashville and Max Herrin, the bank's executive vice-president. Shortly thereafter Heather contacted Herrin and informed him of the need for financing on the railroad crossties and on two or four million metric tons of rice commodities in South America which she stated she owned or controlled. The difference between "two or four million metric tons" and "owned or controlled" should certainly have caused a banker with ordinary intelligence to make some investigation to ascertain whether she owned or controlled the rice, and the amount of it. The bank was eager for her business because she promised the bank a commission of one dollar on each ton of rice she was able to sell.

On May 4, 1974 Heather came to Nashville to open three bank accounts in the Hamilton Bank. She submitted also a notarized financial statement in which she purported to own more than $800,000 in assets. Among those assets, the bulk of her wealth was tied up in four pieces of Florida real estate, in which she claimed ownership of a 25% interest, and a house in Pass Christian, Mississippi. In fact, she did not own any of this property, but the bank did not learn of these facts until late 1974. Heather's account was referred to the International Department of the Hamilton National Bank in Chattanooga, a subsidiary of the Hamilton Bank of Nashville.

*(Opinion Below Reversing Conviction)*

On May 7, 1974 Heather wrote two checks for $6,300 to the Hamilton Bank on her Florida bank checking account. On May 24th the checks were returned unpaid for insufficient funds. Nevertheless, the Hamilton Bank officials arranged to have its John Andresen, from its International Department, accompany Heather to England to check out Heather's buyers on her commodity contracts and the banks that would be issuing letters of credit. Heather agreed to pay Andresen's expenses.

Andresen went to England on May 23, 1974 for two days, and returned for a business meeting. He returned to England on May 30th and remained there until June 13th. Upon his return to the United States his airline ticket, paid for by Heather, was not honored by BOAC because Heather's check to the airline had been returned for lack of sufficient funds.

While in England Andresen never confirmed Heather's ownership of commodities, nor saw any warehouse receipts; however, he did sign as a witness on a "contract" for the sale of 500,000 metric tons of wheat, between Heather as seller and a Mr. Siheeb as buyer. In the space in the contract where the buyer's name was to appear, neither Mr. Siheeb's name nor any other person's name appeared. The deal was never consummated. Moreover, Andresen, Heather, Herrin, and James Denton, Hamilton Bank President, participated in a conference trans-Atlantic telephone call. The call concluded with the bank agreeing to extend Heather $25,000 credit, a portion of which was to be used to clear the unpaid checks and to pay for the



*(Opinion Below Reversing Conviction)*

London trips[1], two of which were made by Andresen, the bank employee. In return, Heather executed a $25,000 promissory note. She received only about $20,000 of the authorized credit. According to Alan Haefele, Vice President and Cashier, she paid $5,300 on the note. The note was not even offered in evidence. The trips to London failed to result in obtaining a single enforcible contract.

It does seem strange that with all the testimony about interstate telephone calls to carry out a scheme to defraud, mail fraud, and false financial statements relating in some instances to railroad crossties, alleged deals for rice and other commodities, concerning which the bank was to receive one dollar a ton as commission on the commodity sales, there was no proof that the bank ever advanced one cent to the defendant on any of these transactions, or that the defendant made any sales whereby the bank would be entitled to a commission.

Because Heather did not pay her indebtedness to the bank, she was charged with fraud, convicted and sentenced to three years' imprisonment, plus probation, on Count 5.

When Heather returned to the United States she went first to New York and Chicago; later she went back to Tennessee to see where she stood with the Hamilton Bank.

On July 5 and 8, 1974 Heather met with John Mousourakis of the International Department in Chattanooga.

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1 The record is unclear whether Heather actually participated in the call, and if she did, whether she heard the entire telephone call. Only Andresen testified that Heather was a part of the call; Herrin and Denton never mentioned Heather as being at the other end of the line.

Again Heather could not verify that she owned any commodities. When asked she presented to Mousourakis the same financial statement which she had previously given to the bank in May, 1974. Mousourakis was not persuaded that Heather was still a good financial risk, and thus Heather's business dealings with the Hamilton Bank were terminated. Heather never produced proof that she owned or controlled the rice commodities, or any other commodities. The railroad crossties deal "fell through".

In November, 1974 the bank employed the services of Timothy Hooper, a private investigator from Hendersonville, Tennessee, to investigate Heather. Apparently Hooper's investigation led to the federal grand jury indictments herein.

II

During the trial the following colloquy occurred at the bench, out of the hearing of the jury:

> Mr. Windsor [Assistant United States Attorney]: I want to make an offer of proof because I think that the nature of it is somewhat sensitive. I don't want to jeopardise [sic] the proceedings so far.
>
> The proof would be testimony from three separate witnesses who acquired the information at three separate times and places from the mouth of this defendant that she was a professional prostitute in Miami and she worked the Democratic Convention and in that year she made $25,000 quote lying on her back end quote and described a house where she lived with other girls and carried on the business of prostitution with a select clientele of rich men and that when Mr. Joe Landrum stated to her upon receiving this knowledge, Heather, I don't think you are capable of that, she replied, of course I am. How do you think I got all those rich men?



> I think it is relevant and proper on the question of her credibility in this case.
>
> The Court: Well, in the first place she doesn't have any credibility, and you have a lot more credibility matters on that.
>
> Mr. Levine [Defense Counsel]: I believe there are.
>
> The Court: I am not talking about in the past. I am talking about overkill. I think this other is just overkill.
>
> Mr. Levine: Right.
>
> The Court: That is just what you have got. Stay away from that if you can avoid it. I think it is overkill. She starts telling you what a good woman she is, that is a different deal. She isn't saying that.

Nevertheless, on rebuttal the Government, through the testimony of Nancy Ladner, Heather's secretary during September, 1973, introduced the following evidence:

> Q. [By the Assistant United States Attorney]: Did she [Heather] ever tell you about a time in Florida where rich men were in competition with each other dating her?
>
> A. [Ms. Ladner]: Yes, sir.
>
> Q. What did she tell you?
>
> A. That there had been several men that had been competing for her favors over a period of a year.
>
> Q. Did she tell you how they competed?
>
> A. Well, that she had been kept by several men over a period of a year.
>
> Q. Did she say how much money she had made that year?
>
> A. $25,000.

The Government did not stop there. It immediately questioned Joe Landrum, a party who had shared office space with Heather during part of 1973, concerning Heather's relationship with rich men. Mr. Landrum testified:

*(Opinion Below Reversing Conviction)*

> Q. [By the Assistant United States Attorney]: Mr. Landrum, did Mrs. Heather McFayden-Snider ever tell you about any relationship she had with rich men in Florida?
> A. Yes, sir.
> Q. Where and when did she tell you this?
> A. In Gulfport, Mississippi, in 1973.
> Q. What did she tell you?
> A. She told me she had sold herself to prominent, wealthy men.

Heather contends that the jury could only conclude from this testimony that she was a prostitute. She argues that such testimony was irrelevant and prejudicial, and therefore it deprived her of a fair trial. It was properly characterized by the District Judge as prosecutorial overkill. Despite the warnings given by the District Judge to the prosecutor at the bench hearing, the prosecutor persisted in ignoring these warnings and deliberately offered the incompetent evidence in rebuttal. This evidence rebutted nothing; plaintiff did not testify that she had been a good moral person.

The effect of the foregoing testimony was to impeach the defendant's character by her sexual conduct. In *United States* v. *Cox,* 536 F.2d 65, 71 (5th Cir. 1976) the Court said:

> Evidence of illicit sexual activities is totally immaterial to the credibility or character traits involved in most criminal cases. . . .

This is especially true where the conduct does not involve a substantive issue of the case, *United States* v. *Cox,* id., and would serve only to unduly harass the defendant. *United States* v. *Marchesani,* 457 F.2d 1291, 1297 (6th Cir. 1972).



*(Opinion Below Reversing Conviction)*

As noted by the Court in *Aaron* v. *United States,* 397 F. 2d 584, 585 (5th Cir. 1968):

> Appellant was on trial for a crime which involved the question of his honesty and fair dealing. The direct examination of his character witness was properly limited to these areas. Rumors of an illicit affair with a woman, even if these rumors were true, were wholly immaterial to the character traits involved in this case. The question was therefore improper, and the defense objection was properly sustained.

The proper standard which the trial judge should apply in receiving this evidence is whether, in his sound discretion, the probative value of the proffered testimony outweighs the possibility of undue prejudice to the defendant. Only upon a grave abuse of discretion will his ruling be overturned. *United States* v. *Jenkins,* 525 F.2d 819, 824 (6th Cir. 1975).

Applying this test to the present case, the trial judge abused his discretion in permitting rebuttal testimony concerning Heather's "prostitution" activities to be introduced into evidence. Allowing Landrum to testify that Heather "sold herself to prominent, wealthy men" not only resulted in prosecutorial overkill, but also permitted the jury to consider evidence of Heather's background which was wholly unrelated to the charges against her of wire and mail fraud and false statements. This evidence added nothing to the prosecutor's case and served only to cater to the passions of the jury. It tended to put her on trial for conduct not in the indictment, and prejudiced her chance for a fair trial.

III

In the Government's case-in-chief Nancy Ladner testified that Heather had given her a pay and severance check in September, 1973; and that the check was unpaid for lack of sufficient funds in the bank. When Ladner confronted Heather about the bad check Heather merely tore up the check and wrote Ladner a new check on a different account in another bank. This second check also was unpaid because the account had been closed.

Similarly, Joe Landrum received a check from Heather for $125,000 representing payment to Landrum for work performed for Heather. He received the check either in late 1972 or early 1973. When he presented the check to the bank Landrum discovered that Heather did not have an account.[2]

Moreover, during cross-examination of the defendant, the Government asked Heather about a $15,400 check allegedly written by Heather to Edmund Smith in January, 1973 on what the evidence indicated was a nonexistent bank account. Although the check was never introduced into evidence, Heather said she did not remember writing the check. She did admit, however, that the signature on the check appeared to be her signature.

At the close of the trial the trial judge instructed the jurors generally as to intent and then noted that the evidence that Heather gave bad checks to Ladner was proba-

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[2] Landrum also testified that he was in possession of a $500 check from Heather. It is unclear from the record whether this check cleared for payment.



tive of Heather's intent to defraud, or a pattern or scheme of action to defraud the Hamilton Bank, but not of her guilt as to the charges in the indictment.

Heather claims that the testimony concerning these bad checks denied her a fair trial. She argues that this evidence was unrelated to the charges in the indictment. The Government on the other hand, responds that its questions to Ladner and Landrum were relevant to show their bias or ill feelings toward the defendant, and that the cross-examination of Heather on the Smith check was proper. This Court, however, agrees with the appellant that she was deprived of a fair trial. Ladner and Landrum were Government witnesses. It is not understandable why the Government would want to prove that its own witnesses were biased. The real reason the prosecutor offered the testimony was to get before the jury incompetent and inadmissible evidence which was highly prejudicial and which deprived the defendant of a fair trial.

The evidence as to the bad checks concerned prior misconduct by the defendant. Such evidence is inadmissible to prove the defendant's character or criminal propensity, but rather, is admissible under Fed. R. Evid. 404(b) to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *United States* v. *Riggins*, 539 F.2d 682, 683-84 (9th Cir. 1976); *United States* v. *Cook*, 538 F.2d 1000, 1003 (3d Cir. 1976); and Fed. R. Evid. 404(b), Advisory Committee Note.

Thus if the proffered evidence concerns misconduct other than that charged in the indictment, it is inadmissible when the resulting prejudice would be too great. *United States*

v. *Wiley,* 534 F.2d 659, 663 (6th Cir. 1976), and would "not tend to establish the commission by the accused of the offense charged." *United States* v. *McCarthy,* 470 F.2d 222, 224 (6th Cir. 1972). See also *United States* v. *Blanton,* 520 F.2d 907, 909-10 (6th Cir. 1975), and *United States* v. *Gebhart,* 441 F.2d 1261, 1264 (6th Cir.), cert. denied, 404 U.S. 855 (1971).

In the present case the evidence that Heather gave Landrum, Ladner and Smith bad checks was wholly unrelated to the charges of wire and mail fraud and false statements. Admittedly the evidence that Heather gave the Hamilton Bank and BOAC bad checks was admissible even though the checks were later paid by the $25,000 loan made to her by the bank, which also took care of the expenses of the trips to London.

Appellant Heather does not challenge this evidence. However, the contested evidence of bad checks to others tended to put the defendant on trial for her prior misconduct, for which she was not charged. This evidence did not merely imply that Heather was a party to other mischief, but rather it directly imputed to her other bad acts that were not necessary to prove the prosecution's case, and thus the evidence was prejudicial to her right to a fair trial.

Furthermore, the trial court's jury instruction did not cure the prejudice from the inadmissible evidence. The jury instruction was too limited because only the bad checks to Ladner were ever mentioned. The jury's exposure to this evidence during the trial was never limited by cautionary instructions that the evidence was received only as to the defendant's intent. See *United States* v. *Ailstock,* 546 F.2d 1285, 1291 (6th Cir. 1976).



IV

The testimony concerning Heather's prostitution, and the repeated introduction of evidence of Heather's writing of bad checks, independently are reversible error. Although the evidence as to the bad checks is a closer question, the Court is of the opinion that these errors were not harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

Lastly, Heather claims that the trial judge's active participation in the trial and his questioning of witnesses during the trial gave the jury the impression that he did not believe the defendant's testimony, and that he was biased and partial to the prosecution. Because of our resolution of the question of admissibility of the testimony concerning Heather's prostitution activities and the bad checks we need not reach this issue, as it is unlikely that the District Judge would want to try this case again.

We therefore reverse the judgment of conviction of the defendant and accordingly remand this case to the District Court for a new trial.

## APPENDIX B

### ORDER SUSTAINING TRIAL COURT'S ORDER DENYING MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS

**(Filed December 9, 1977)**

Nos. 77-5214, -5215, -5216

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

vs.

HEATHER MCFAYDEN-SNIDER,

*Defendant-Appellant.*

ORDER

Before WEICK, LIVELY and MERRITT, *Circuit Judges.*

In *United States* v. *McFayden-Snider,* 552 F.2d 1178 (6th Cir. 1977), we reversed and remanded for a new trial the conviction of the defendant on two counts of an indictment charging her with the making of interstate telephone calls for the purpose of carrying out a scheme to defraud the Hamilton Bank of Nashville, in violation of 18 U.S.C. § 1343, and one count of making a false financial statement to the Bank for the purpose of influencing said Bank to extend credit, in violation of 18 U.S.C. § 1014.

The basis for the reversal was the misconduct of the prosecutor in offering testimony concerning prostitution and illicit sexual activities of the defendant, and also con-



cerning her writing of bad checks, none of which testimony was relevant to any issue in the case.

We did not pass upon the issue of conduct of the Judge as we felt that he would not want to preside at any retrial of the case.

Upon retrial the defendant filed a motion to dismiss the indictment and to bar further prosecution on the ground of double jeopardy, which motion was denied by the District Court. The defendant has appealed from such denial. The defendant has cited no cases to us upholding any such proposition; nor did she object to our decision remanding the case for a new trial, nor claim that the remand would violate her constitutional rights.

The judgment of the District Court denying the motion to dismiss is hereby affirmed in Appeal No. 77-5214.

The Government waited until after our reversal of the judgment of conviction to indict the defendant on two counts of perjury. The first count charged her with making false statements in connection with a declaration of trust; the second count charged her with testifying falsely that she had been married to Snider.

Defendant filed a motion to dismiss the indictment on the grounds that the prosecution violated her due process rights, double jeopardy, and collateral estoppel. She also claimed that she had been indicted for perjury because she had appealed from her conviction. The District Court denied the motion.

Defendant also filed a motion to dismiss on the ground of purposeful and intentional delay. The Court also denied

that motion after an evidentiary hearing; she has appealed therefrom. We find no prejudice in the delay.

With respect to the claim of double jeopardy, we are of the opinion that it has no merit, as we explained in our dicision in Appeal No. 77-5214.

We think, however, that it is unusual for the Government to seek an indictment for perjury when there has been a conviction at the criminal trial. It may violate the due process rights of the defendant. This question can be determined at the trial. It bears all the earmarks of punishment of the defendant for prosecuting an appeal. At the oral argument the prosecutor admitted that there probably would have been no perjury indictment if an appeal had not been taken.

Upon the remand of this case the District Court is directed to conduct an evidentiary hearing to determine whether the prosecution would have sought a perjury indictment if the defendant had not appealed and the judgment had not been reversed. If the evidence supports such contention the perjury indictment should be dismissed. No one should be punished for prosecuting an appeal.

The Judgment of the District Court in Appeals Nos. 77-5215 and 77-5216 is affirmed as modified.

Entered By Order Of The Court

/s/ John P. Hehman
Clerk

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## APPENDIX C

### ORDER DENYING PETITION FOR REHEARING

**(Filed January 13, 1978)**

No. 77-5214

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

vs.

HEATHER MCFAYDEN-SNIDER,

*Defendant-Appellant.*

**ORDER**

Before: WEICK, LIVELY and MERRITT, *Circuit Judges.*

We find no merit in the petition for rehearing and it is hereby denied.

It has long been settled that where a defendant has successfully appealed from his conviction and the judgment is reversed, he may be retried. A plea of double jeopardy in such a case is denied. *United States* v. *Ball,* 163 U.S. 662 (1896). *Cf. Green* v. *United States,* 355 U.S. 184, 189 (1957).

Entered By Order Of The Court

/s/ John P. Hehman
Clerk

on the face of this is stamped "filed January 13, 1978".

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